IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-446

TENNESSEE VALLEY AUTHORITY, ET AL., *Petitioners,*

v.

FRANK L. EASTLAND, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

ROBERT A. MURPHY
RICHARD T. SEYMOUR
Lawyers' Committee For Civil Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, D.C. 20005

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully oppose the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

COUNTERSTATEMENT OF THE STATUTE AND REGULATIONS INVOLVED

In addition to the provisions cited by the petitioners, the following provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended by the

Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, are involved:

> Sec. 706(g). If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. . . .
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> (k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.
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> Sec. 717(d). The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.
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> (e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

In addition to the provisions cited by the petitioners, the following provisions of Title 5 of the Code of Federal Regulations are involved:

5 C.F.R. § 713.234 Appellate procedures.

> The Appeals Review Board shall review the complaint file. . . . The board shall issue a written decision . . . and shall send copies thereof to the complainant . . . . The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with § 713.282.

§ 713.282 Notice of right.

> An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 713.215, 713.217, 713.220, or § 713.221. The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under § 713.234.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where § 717(d) of the amended Civil Rights Act of 1964 expressly states that "[t]he provisions of section 706(f) through (k), as applicable, shall govern civil actions brought" under § 717, shall the same principles govern the scope of a lawsuit brought under § 717 as govern the scope of a lawsuit brought under § 706(f)?

2. Under the circumstances stated above, shall the same principles govern the availability of class relief under § 717 as govern the availability of class relief under § 706(g)?

3. If the answer to the second question is in the affirmative, shall the ordinary right of a class member to intervene or be joined as a party in a class action, without independently satisfying jurisdictional requirements, be precluded in cases brought under § 717?

4. The petitioners' third question presented.

COUNTERSTATEMENT OF THE CASE

After exhausting his administrative remedies and receiving from the U.S. Civil Service Commission a letter informing him of his right to bring suit, respondent Eastland timely filed this action on May 21, 1973. The original Complaint alleged a broad range of racially discriminatory employment practices by the Tennessee Valley Authority (TVA) at its Muscle Shoals, Alabama operations and facilities, and was brought on behalf of the respondent and the class of black applicants and employees he sought to represent. By leave of the district court, an Amended Complaint was filed on October 19, 1973. The Amended Complaint added two new parties defendant for the purposes of relief, and added eleven new plaintiffs.

Two of the eleven new plaintiffs—respondents Sheffield and James—had exhausted their administrative remedies and had brought suit (by way of the motion for leave to file the Amended Complaint) within thirty days of their receipt of letters notifying them of their right to sue. Five of the new plaintiffs—respondents Oates, Vinson, Cohen, Fuqua and Puryear—had filed administrative charges of discrimination, received adverse agency decisions, appealed to the Appeals Review Board of the Civil Service Commission, and had been notified that the Board had decided their cases adversely. In violation of its own regulations, the Civil Service Commission did not notify these respondents of their right to file a civil action, but stated only that its decision was final and that they had no further right of administrative appeal. These respondents alleged that they did not know of their right to file a civil action, and more than thirty days thus passed before they brought suit. The remaining four new plaintiffs—respondents Fitzgerald, Ricks, Nash and Littleton—had not independently satisfied the jurisdictional requirements to bring suit under Title VII, but sought intervention or joinder as class members.

Both the original Complaint and the Amended Complaint alleged violations of Title VII, of the Fifth Amendment, and of other provisions. Both sought back pay and injunctive relief against the head of the agency under § 717, and both sought monetary relief against petitioners Wagner and Nelson in their individual capacities.

The petitioners had moved to dismiss, or in the alternative for summary judgment, in August 1973 and renewed their motion after the filing of the Amended Complaint. The district court granted the motion in substantial part, holding that all plaintiffs other than respondents Eastland and Sheffield had failed to meet independent jurisdictional prerequisites to suit,[1] that class treatment was unavailable as a matter of law, that in any event only those persons who had independently satisfied the jurisdictional prerequisites to suit could be treated as class members, and that there was no right to a trial *de novo* in an action brought under § 717. Pet. A-15 to A-31. The district court subsequently granted summary judgment against respondent Sheffield on the basis of his administrative record, and remanded respondent Eastland's claim to the administrative process.

On appeal, the Fifth Circuit affirmed the entry of summary judgment against respondents Fitzgerald, Ricks, Nash, Littleton, Vinson, Oates, Cohen, Fuqua and Puryear as plaintiffs in their own right, but held that they may be allowed to intervene as class members in the event that the district court subsequently determines class certification to be proper. The court of appeals also

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[1] The district court inconsistently found (a) that respondent James had not exhausted his administrative remedies, and (b) that he had exhausted such remedies but that summary judgment should be entered against him based on the administrative record. *Compare* Pet. A-14 *with* Pet. A-26 to A-27. The Fifth Circuit reversed, Pet. A-7 to A-8, and petitioners do not challenge its ruling here.

held that respondents are entitled to a trial *de novo* of their claims of discrimination, that class treatment is available under § 717, that the class may include persons who have not themselves exhausted the administrative process, and that the judicial action is not necessarily restricted to the specific contentions raised in the administrative complaint, but may include "those issues that may reasonably be expected to grow out of the administrative investigation of their claims." Pet. A-1 to A-12. In its February 28, 1977 decision, the court of appeals affirmed the entry of summary judgment on the claims based on 42 U.S.C. § 1981 and on the Fifth Amendment, Pet. A-8, but in its May 23, 1977 modification deleted the reference to the Fifth Amendment. Pet. A-12. Finally, the court of appeals allowed respondents two-thirds of their costs.

Neither the district court nor the court of appeals ever decided or addressed the question whether a court may enter judgment for "money damages and costs" against "defendants other than the 'head of the . . . agency'" in cases brought under § 717(c). Neither court decided or addressed the question whether any defendants herein were not properly sued.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The decision sought to be reviewed did little more than apply to the issues before it the rationale of this Court's decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), and the holdings of prior decisions of this Court respecting the procedural rights of class members.

In *Chandler*, 425 U.S. at 846-48 and 857-61, this Court held that § 717(d) generally incorporates into § 717 cases the procedures of §§ 706(f) through (k) other than those detailing the enforcement responsibilities of the EEOC

and the Attorney General, and that the primary intent of Congress in adopting this section was to provide the same procedural rights in private lawsuits under § 717 as in private lawsuits under § 706. This Court found that Congress intended to avoid "remedial disparity" in the two types of cases, and desired "equal treatment of private-sector and federal-sector complainants." 425 U.S. at 857.

Thus, this Court's holdings in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 note 8 (1975), and in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771 (1976), govern the instant case: nonexhausting class members may receive individualized relief in class actions brought under § 706. Nothing in the language or legislative history of § 717 precludes the application of this principle to Federal-sector claims of discrimination, and no court of appeals has held to the contrary. The only other appellate decisions on point, *Hackley* v. *Roudebush*, 520 F.2d 108, 151-53 note 177 (D.C.Cir. 1975), and *Williams* v. *Tennessee Valley Authority*, 552 F.2d 691, 697 (6th Cir., 1977), *petition for rehearing pending*, are in full agreement with the decision in the case at bar.[2]

Similarly, it has long been settled that the old rules of common law pleading do not apply to administrative charges of discrimination filed under § 706, and that a charging party—who is usually without the benefit of counsel at the time that the charges are filed—may challenge in court any practice which a reasonable investigation of his or her allegations would have included.[3] For example,

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[2] The "conflict" described by petitioners, Pet. 12, is no more than a tentative class definition in *Williams* which overlaps with the description of the potential class in the original Complaint and Amended Complaint herein. There are readily available procedures for the resolution of such matters in the event that the district court herein ultimately certifies the class described.

[3] *Sanchez* v. *Standard Brands*, 431 F.2d 455, 466 (5th Cir., 1970); *Gamble* v. *Birmingham Southern R.R. Co.*, 514 F.2d 678, 687-89

a charging party may allege that he or she was not promoted because of race. Lacking the kinds of factual information which a trained investigator could discover, he or she may not know that the actual cause of the denial of promotion may have been discrimination on some other prohibited basis,[4] or a general pattern of discrimination in favor of less-qualified whites.[5] The charging party harmed by a facially neutral practice, such as a test or an educational requirement, may, because of his or her lack of legal sophistication, be completely unaware that the practice is open to challenge. To limit the scope of a subsequent lawsuit to the matters expressly stated in the administrative charge is to limit the charging party's access to the courts in proportion to his or her degree of sophistication. *Cf. Goldberg* v. *Kelly,* 397 U.S. 254, 268-69 (1970), which held that the restriction of welfare recipients' right to participate in hearings on the revocation of their benefits to the submission of written statements was such a barrier to effective participation as to deprive them of due process. *See also Haines* v. *Kramer,* 404 U.S. 519, 520 (1972), and *Love* v. *Pullman Co.,* 404 U.S. 522, 527 (1972).

(5th Cir., 1975); *Tipler* v. *E.I. duPont de Nemours & Co.,* 443 F.2d 125, 131 (6th Cir., 1971); *Graniteville Co. (Sibley Div.)* v. *EEOC,* 438 F.2d 32, 37-39 (4th Cir., 1971); *Russell* v. *American Tobacco Co.,* 528 F.2d 357, 365 (4th Cir., 1975), *cert. den.,* 425 U.S. 935 (1976); *Jenkins* v. *Blue Cross Mut. Hosp. Ins.,* 538 F.2d 164, 167-68 (7th Cir., 1976) (*en banc*).

[4] In *Sanchez,* the plaintiff thought that she had been discriminated against because of sex, but the EEOC investigation determined that she had actually been discriminated against because of her national origin.

[5] Neither applicants nor employees ordinarily know the qualifications of other applicants and employees. The information to establish patterns of disparate treatment must be obtained in either an agency investigation or in the court discovery process.

Congress was aware of the subtle and complex nature of many discrimination claims when it passed the Equal Employment Opportunity Act of 1972,[6] but took no action to restrict access to the courts along the lines suggested by petitioners. Its concern was to effectuate, not limit, the promise of nondiscrimination in employment. The Fifth Circuit therefore did not err in following the rationale of *Chandler* and extending the scope-of-suit principles developed in § 706 cases to the case at bar. No court of appeals has ruled to the contrary.[7]

TVA complains as well of the Fifth Circuit's holding that class members may intervene in a proper class action brought under § 717, without independently satisfying jurisdictional requirements.[8] Here, the court of ap-

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[6] The Report of the House Committee on Education and Labor stated in pertinent part:

> . . . The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. . . .
>
> It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.

H. Rep. No. 92-238 (92nd Cong., 1st Sess.) at 8, 1972 *U.S. Code Cong. & Admin. News* 2137, 2144.

[7] *Ettinger* v. *Johnson,* 518 F.2d 648, 651-52 (3rd Cir., 1975), is not necessarily in conflict with the Fifth Circuit's holding in *Eastland.* The Third Circuit's discussion does not make clear the nature of the act required to "raise" an issue in the administrative process, and nothing in the opinion indicates that that court would disagree with the *Eastland* decision. The table affirmance in *Kurylas* v. *U.S. Dept. of Agriculture,* 514 F.2d 894 (D.C. Cir., 1975), does not even indicate the issues on which the court of appeals was asked to rule, let alone those it considered dispositive. *Weinberger* v. *Salfi,* 422 U.S. 749 (1975), was a Social Security case and has nothing to do with the case at bar.

[8] In the event that the Court decides to grant certiorari on this

peals did no more than effectuate the ordinary rule adopted by this Court in *Stewart* v. *Dunham,* 115 U.S. 61, 64 (1885) and in *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356, 366 (1921). See 3B Moore's *Federal Practice* ¶ 24.18[3] at p. 24-782 (1977). This rule was extended to private-sector Title VII cases in *Oatis* v. *Crown Zellerbach Corp.,* 398 F.2d 496, 499 (5th Cir., 1968), and the panel below followed the rationale of *Chandler* in applying the rule to § 717 class actions. No court of appeals has ruled to the contrary.[9]

The petitioners also complain that the court of appeals assessed costs against those petitioners who were not the "head" of TVA. In fact, the court of appeals merely entered an order generally assessing two-thirds of respondents' costs. The costs will undoubtedly be paid by the "head" of TVA in his official capacity, and the

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issue, a "subsidiary question fairly comprised therein", Supreme Court Rule 23(1)(c), is whether the court of appeals correctly held that respondents Oates, Vinson, Cohen, Fuqua and Puryear had not timely filed suit.

Section 717(b) of the Act authorizes the Civil Service Commission to issue legislative regulations, and 5 C.F.R. §§ 713.234 and 713.282 require the Commission to notify complainants of their right to file suit. The court below held that these regulations could not "override the jurisdictional requirement that suit be filed" within thirty days. Pet.A-6. In fact, these regulations merely prescribe the type of notice which in fairness should start the thirty-day period running, and this is clearly consistent with the statutory grant of rulemaking authority.

Two courts of appeals have decided the question in a manner that conflicts with the decision of the Fifth Circuit. *Allen* v. *United States,* 542 F.2d 176, 179-80 (3rd Cir., 1976); *Coles* v. *Penny,* 531 F.2d 609, 616-17 (D.C. Cir., 1976).

[9] The petitioners have suggested that the decision of the Fifth Circuit would resurrect some claims already decided adversely to some of the respondents in court. This is not correct; the respondents have other claims, not barred by *res judicata,* which may be asserted in a proper class action.

question raised by the petitioners—which apparently assumes that the "head" of TVA will refuse to pay the costs and that the other defendants will then be forced to pay them—is too hypothetical to warrant the issuance of a writ of certiorari.

Finally, it must be pointed out that the United States has repudiated the position of TVA that the procedural rights of Federal-sector plaintiffs in court cases brought under § 717 should differ from those of private-sector plaintiffs in court cases brought under § 706. Not only has the Solicitor General refused to represent the petitioners before this Court,[10] but the Attorney General has also expressly acquiesced in the decision petitioners seek to have reviewed, and has directed all United States Attorneys and agency General Counsels not to raise the types of arguments TVA raises herein. Memorandum of the Attorney General on Title VII Litigation, August 31, 1977.[11]

For the reasons stated above, respondents pray that this Court deny the petition.

Respectfully submitted,

ROBERT A. MURPHY
RICHARD T. SEYMOUR
Lawyers' Committee For Civil
Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, D.C. 20005

October 25, 1977

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[10] Application for an Extension of Time Within Which to Petition for a Writ of Certiorari, August 1977.

[11] The Memorandum is reproduced in the Appendix to this brief.

APPENDIX

APPENDIX

MEMORANDUM FOR UNITED STATES ATTORNEYS AND AGENCY GENERAL COUNSELS

Re: Title VII Litigation

In 1972, as additional evidence of our Nation's determination to guarantee equal rights to all citizens, Congress amended Title VII of the Civil Rights Act of 1964 to provide Federal employees and applicants for Federal employment with judicially enforceable equal employment rights. The Department of Justice, of course, has an important role in the affirmative enforcement of rights under the Act, in both the private and public sectors. To effectively discharge those responsibilities, we must ensure that the Department of Justice conducts its representational functions as defense attorneys for agencies in suits under the Act in a way that will be supportive of and consistent with the Department's broader obligations to enforce equal opportunity laws. This memorandum is issued as part of what will be a continuing effort by the Department to this end.

Congress, in amending Title VII, has conferred upon Federal employees and applicants the same substantive right to be free from discrimination on the basis of race, color, sex, religion, and national origin, and the same procedural rights to judicial enforcement as it has conferred upon employees and applicants in private industry and in state and local governments. *Morton* v. *Mancari,* 417 U.S. 535 (1974); *Chandler* v. *Roudebush,* 425 U.S. 840 (1976). And, as a matter of policy, the Federal Government should be willing to assume for its own agencies no lesser obligations with respect to equal employment opportunities than those it seeks to impose upon private and state and local government employers.

In furtherance of this policy, the Department, whenever possible, will take the same position in interpreting Title

VII in defense of Federal employee cases as it has taken and will take in private or state and local government employee cases. For example, where Federal employees and applicants meet the criteria of Rule 23 of the Federal Rules of Civil Procedure, they are also entitled to the same class rights as are private sector employees. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 (1975). Further, the Department of Justice has acquiesced in the recent rulings of the Fifth and Sixth Circuit Courts of Appeals that it is unnecessary for unnamed class members to exhaust their administrative remedies as a prerequisite to class membership. *Eastland* v. *TVA*, 553 F.2d 364 (5th Cir. 1977); *Williams* v. *TVA*, —— F.2d —— (6th Cir. 1977). Consequently, we will no longer maintain that each class member in a Title VII suit must have exhausted his or her administrative remedy.

In a similar vein, the Department will not urge arguments that rely upon the unique role of the Federal Government. For example, the Department recognizes that the same kinds of relief should be available against the Federal Government as courts have found appropriate in private sector cases, including imposition of affirmative action plans, back pay and attorney's fees. *See Copeland* v. *Usery*, 13 EPD ¶ 11,434 (D.D.C. 1976); *Day* v. *Mathews*, 530 F.2d 1083 (D.C. Cir. 1976); *Sperling* v. *United States*, 515 F.2d 465 (3d Cir. 1975). Thus, while the Department might oppose particular remedies in a given case, it will not urge that different standards be applied in cases against the Federal Government than are applied in other cases.

The Department, in other respects, will also attempt to promote the underlying purpose of Title VII. For example, the 1972 amendments to Title VII do not give the Government a right to file a civil action challenging an agency finding of discrimination. Accordingly, to avoid any appearance on the Government's part of unfairly hindering Title VII law suits, the Government will not attempt to

contest a final agency or Civil Service Commission finding of discrimination by seeking a trial *de novo* in those cases where an employee who has been successful in proving his or her claim before either the agency or the Commission files a civil action seeking only to expand upon the remedy proposed by such final decision.

The policy set forth above does not reflect, and should not be interpreted as reflecting, any unwillingness on the part of the Department to vigorously defend, on the merits, claims of discrimination against Federal agencies where appropriate. It reflects only a concern that enforcement of the equal opportunity laws as to all employees be uniform and consistent.

In addition to the areas discussed above, the Department of Justice is now undertaking a review of the consistency of other legal positions advanced by the Civil Division in defending Title VII cases with those advocated by the Civil Rights Division in prosecuting Title VII cases. The objective of this review is to ensure that, insofar as possible, they will be consistent, irrespective of the Department's role as either plaintiff or defendant under Title VII. As a part of this review, "the Equal Employment Opportunity Cases" section of the Civil Division Practice Manual (§ 3-37), which contains the Department's position on the defense of Title VII actions brought against the Federal Government, is being revised. When this revision is completed, the new section of the Civil Division Practice Manual will be distributed to all United States Attorneys' Offices and will replace the present section. Each office should rely on the revised section of the Manual for guidance on legal arguments to be made in Title VII actions. In order to ensure consistency, any legal arguments which are not treated in the Manual should be referred to the Civil Division for review prior to their being advocated to the court.

This policy statement has been achieved through the cooperation of Assistant Attorney General Barbara Babcock of the Civil Division who is responsible for the defense of these Federal employee cases, and Assistant Attorney General Drew Days of the Civil Rights Division who is my principal adviser on civil rights matters. They and their Divisions will continue to work closely together to assure that this policy is effectively implemented.

/s/ GRIFFIN B. BELL
Griffin B. Bell

August 31, 1977